IMMEDIATE STAY REQUESTED

The federal deadline to encumber the stimulus funds at issue in this proceeding is October 21, 2010. The Commission must be freed from the restraining order to be able to act prior to de-obligation of the funds by the United States Department of Energy. The Superior Court's temporary restraining order lasts through the date of the contempt hearing, currently set for November 4, 2010

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION TWO

CALIFORNIA ENERGY COMMISSION,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF RIVERSIDE,
Respondent

WESTERN RIVERSIDE COUNCIL OF GOVERNMENTS,
Real Party in Interest

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT OR RELIEF TO VACATE TEMPORARY RESTRAINING ORDER, PROHIBIT HEARING ON ORDER TO SHOW CAUSE RE CONTEMPT, VACATE ORDER TO SHOW CAUSE AND INJUNCTION, AND DISMISS CASE

Riverside County Superior Court, No. RIC10005849
Department 4, The Honorable John D. Molloy
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INTRODUCTORY STATEMENT

Petitioner California Energy Resources Conservation and Development Commission (Commission) seeks immediate and extraordinary relief from a temporary restraining order and an order to show cause regarding contempt – orders imposed by Respondent Superior Court of Riverside County on October 14, 2010, which block the Commission from spending $33,176,912 in federal stimulus funds from the America Recovery and Reinvestment Act (ARRA), and pose an imminent risk of causing the State of California to forfeit that money. The federal deadline to encumber the funds is October 21, 2010, yet the restraining order lasts through November 4, 2010, when the Respondent will hear arguments as to contempt. If the Commission cannot execute a planned contract for a new, comprehensive statewide energy efficiency program by the October 21st deadline, the United States Department of Energy (DOE) is free to withdraw the funds, in which case Californians will suffer irreparable harm from the triple loss of clean energy jobs, measurably significant energy savings, and a substantial boost to local economies still in the grips of the national recession.

In sum, this case is extremely simple: With federal stimulus money from DOE, which must be obligated by a date-certain, the Commission issued a contract solicitation for specific services. Along with 15 other applicants, Western Riverside submitted a bid, but was disqualified because its bid did not offer the services required in the solicitation. Western Riverside tried to "protest" (appeal) the disqualification with the Department of General Services (General Services), but General Services dismissed the protest as untimely. Western Riverside obtained a writ of mandate from Respondent directing General Services to hear the protest anyway, and an order barring the Commission from performing under the

contracts awarded to the successful bidders, pending the outcome of the protest.

Before the protest was heard, federal regulators issued rules that rendered the services sought by the solicitation infeasible. Accordingly, the Commission cancelled both the solicitation and all contract awards under it, and sought to redirect the funds to a broader statewide program, that would inure to the benefit of all 58 counties in California.

Western Riverside however, filed a motion for a restraining order enjoining the Commission from redirecting the funds, and claiming that the Commission should be held in contempt for allegedly circumventing the order to hear the protest on the defunct bid and solicitation. At the hearing, the Commission objected because Western Riverside failed to oppose three separate public hearings about the need to cancel and redirect the funds—first on July 28, 2010, when the Commission cancelled the solicitation; second, on August 6, 2010, when Commission revised the regulations governing the expenditure of the funds; and third, on September 22, 2010, when the funds were re-awarded under the contract Western Riverside contends was contemptible. The Superior Court instructed the Commission that its exhaustion claims "fall on deaf ears".

Even though the new federal rules also prevent Western Riverside from performing the services it offered in its bid, and the protest hearing is moot because contracts cannot be let under the cancelled solicitation, the Superior Court granted the motion. The Superior Court issued a written temporary restraining order and order to show cause, but orally expanded the order's scope to seize full control over not just the canceled solicitation, but over any use of the stimulus funds pending a contempt hearing on November 4, 2010. The federal deadline to encumber the funds is October 21, 2010, and the Superior Court's order prevents the Commission from

exercising its lawful discretion to use those funds for the benefit of California.

Unbeknownst to the Commission, on August 2, 2010, and on September 13, 2010, Western Riverside admitted that its own program was suspended due the same actions of the federal regulators, and that the Commission had cancelled the solicitation pursuant to the direction of the United States Department of Energy, in response to the new federal regulation. In fact, in the August 2nd staff report, Western Riverside staff expressly supported the Commission's cancellation of the PON.

The Commission has no adequate remedy at law, and the entire State of California will suffer if the October 14, 2010 order is not vacated, or stayed, immediately. No harm will come to Western Riverside from a stay—the protest hearing it won in the writ of mandate cannot undo the federal impediments to the services, and no court can compel the Commission to enter into contracts for services that the Commission determines are not needed by the People of California.

Conversely, the federal deadline to encumber the funds looms. The People of California should not lose the opportunity to help ease the burdens of the lingering recession with the program the Commission created in response to the recent changes to the federal regulations.

The Commission seeks immediate relief from these orders, because they violate the separation of powers between the executive and legislative and judicial branches of government, the agency's independent discretion, and basic principles of ordinary and public contract law. Specifically, the orders rest on the presumption that the trial court's adjudication of one public contract solicitation can vest the court with jurisdiction over the agency's statutory discretion to redirect and distribute the underlying funds, even when the State can no longer use the services that were the subject of the original solicitation. The orders were also entered despite the trial

court's own uncertainty about its authority to hold a state agency in contempt. Further, the orders were issued without the required evidentiary showing by Western Riverside that it is likely to prevail; no evidence was offered of irreparable harm.

The Commission respectfully makes this extraordinary plea for immediate relief from these orders, to avoid the imminent and substantial economic and environmental harm to Californians from the loss of federal funding, green jobs and energy savings.

PETITION FOR WRIT OF MANDATE, PROHIBITION OR OTHER APPROPRIATE WRIT OR RELIEF

The Commission respectfully petitions this Court for a writ of mandate, prohibition and/or other appropriate relief, including:

a. an immediate stay of a temporary restraining order by Respondent Riverside County Superior Court on October 14, 2010 blocking the Commission from distributing $33,176,912 of ARRA funds;

b. a writ of prohibition preventing the Respondent from hearing the order to show cause regarding contempt, set for November 4, 2010;

c. a writ of mandate directing Respondent to vacate the temporary restraining order;

d. a writ of mandate directing Respondent to vacate the order to show cause regarding contempt; and

e. a writ of mandate directing Respondent to vacate its May 21, 2010 order granting the writ of mandate by Real Party in Interest Western Riverside Council of Governments (Western Riverside) directing the Department of General Services to adjudicate

Western Riverside's protest, and enjoining the Commission from performing its obligations under the solicitation.

To these ends, Petitioner alleges:

BENEFICIAL INTEREST OF PETITIONER; CAPACITIES OF RESPONDENT AND REAL PARTY IN INTEREST

1. Petitioner California Energy Resources Conservation and Development Commission (Commission) is respondent and defendant in Western Riverside Council of Governments v. Department of General Services, California Commission, Case No. RIC 10005849 pending in Riverside County Superior Court, and has been restrained by the Riverside County Superior Court from executing contracts to distribute $33,176,912 in ARRA funds by the federal deadline of October 21, 2010. (Vol. III, Tab D59, p. 2162) The Commission has a beneficial interest in preserving and protecting its right to lawfully exercise its statutory and regulatory authority generally, and specifically as such authority relates to the distribution of the federal ARRA funds that are the subject of this litigation.

2. Respondent is the Riverside County Superior Court, which entered each of the orders challenged in this petition, including: the October 14, 2010, temporary restraining order and order to show cause regarding contempt; and the May 21, 2010, order granting the writ of mandate and injunction. (Ibid; Vol. III, Tab D29, p. 496)

3. Real Party in Interest is the Western Riverside Council of Governments (Western Riverside), which on April 1, 2010, initiated the underlying suit, and on October 12, 2010, filed the ex parte application leading to the temporary restraining order and order to show cause regarding contempt. (Vol. I, Tab D1, p. 73; Vol. IV, Tab D53, p. 1048)

AUTHENTICITY OF EXHIBITS

4. The exhibits accompanying this petition are true and correct copies of original documents filed with Respondent, except for Exhibits D57 and D54 which are true and correct copies of the reporter's transcripts of the October 13, 2010, and October 14, 2010, hearings before the Honorable John D. Molloy regarding Western Riverside's ex parte application for a temporary restraining order and order to show cause regarding contempt, and Exhibit D44, which is a true and correct copy of the reporter's transcript of the July 2, 2010, hearing before the Honorable John D. Molloy denying the stay of, and clarifying, his May 21, 2010, order granting the writ of mandate and injunction. The exhibits are paginated consecutively from page 1 to page 2273. Page references in this petition are to the consecutive pagination.

SUMMARY OF RELEVANT FACTS AND PROCEDURE

Background Facts

5. In February 2009, the United States Congress ("Congress") enacted the American Recovery and Reinvestment Act of 2009 ("ARRA," Pub.L. No. 111-5 (February 17, 2009) 123 Stat. 115). ARRA's purposes include the creation of jobs to promote economic recovery and investment in infrastructure that will provide long-term economic benefits (Id., § 3, subd. (a).) ARRA provides that funds distributed under it are designated as an emergency requirement and necessary to meet emergency needs. (Id., § 5.)

6. On April 21, 2009, the U.S. Department of Energy (DOE), as the implementing agency for ARRA's provisions regarding energy, awarded the Commission $226 million for the State Energy Program ("SEP"), and required the Commission to complete the award and

contracting process for such funds within 18 months after receiving the award.

> The period of performance for these grants will be thirty-six (36) months. In keeping with the agenda of the Recovery Act, and supporting the goal of immediate investment in the economy, entities are required to obligate/commit all funds within eighteen (18) months from the effective date of the award. In the event funds are not obligated/committed within eighteen (18) months. DOE reserves the right to deobligate the funds and cancel the award.
>
> DOE anticipates making grant awards that will have a three (3) year period of performance. Applicants must ensure that all funds are obligated for authorized activities within eighteen (18) months.

(DE-FOA-0000052 (April 24, 2009), Vol. VIII, Tab E, p. 2107; SEP Assistance Award, Vol. VIII, Tab F, p. 2218.) Thus, the Commission's deadline to execute contracts for expenditure of the funds is October 21, 2010.

7. To assist in meeting federal deadlines and requirements, the California Legislature enacted urgency legislation, signed by the Governor on July 28, 2009, giving the Commission broad discretion in administering and distributing ARRA funds. (Pub. Res. Code §§ 25460 – 25463, as enacted by Assembly Bill X4 11 (Stats. 2009, 4th Ex. Sess., ch. 11, sec. 22.)

8. Pursuant to Public Resources Code section 25462, on September 30, 2009, the Commission adopted ARRA SEP Guidelines (Guidelines), which detail how the Commission would distribute, and the requirements that must be met to receive, the SEP funds received under ARRA. (Vol. III, Tab D34, p. 602-646.)

9. On October 10, 2009, the Commission released Program Opportunity Notice 400-09-401 (PON 401), a public contract solicitation that requested proposals from cities, counties, or groups of cities and counties in California to establish or continue municipal financing

programs to implement energy efficiency retrofits in existing residential, commercial, and industrial buildings. (Vol. VIII, Tab D34, pp. 647-709.)

10. Among other things, PON 401 required the municipal financing programs to utilize contractual assessments which take first-priority over previously-recorded private liens (such as mortgages) and are repaid with the owner's property taxes. (Vol. III, Tab D34, p. 662.) These contractual assessments are commonly referred to as "property assessed clean energy" (PACE) financing. In California, the Legislature expressly authorized local governments to create municipal financing districts and utilize first-priority PACE financing. (Streets and Highways Code, sections 5898.20–5898.32 (enacted by Assembly Bill (AB) 811, Statutes of 2008)).

11. Another mandatory criterion of both the SEP Guidelines and PON 401 required compliance with the "Loading Order." (Vol. III, Tab D34, p. 670.) The Loading Order has been an integral policy in State Energy Planning since at least 2003. (Vol. III, Tab D34, p. 716-718.) In the context of the solicitation, this Loading Order requirement mandates an applicant's proposed program to require and offer financing for energy efficiency that will achieve at least a 10% reduction in total energy use as a condition of financing on-site solar electric or other renewable generation. In lay terms, the Loading Order requires measures such as insulation, heating, ventilating and air conditioning (HVAC) duct sealing, building envelope sealing (finding and sealing holes in the ceiling, wall and floor that waste energy), before purchasing and installing photovoltaic or solar panels for a home. PON 401 provides that one of the express purposes of the Loading Order requirement is to lead to installation of smaller and less costly solar electric systems. (Id., p. 663.)

12. PON 401 stated that proposals receiving a score of zero points for the Loading Order requirement would be rejected. (Id., p. 707.)

13. PON 401 stated that a score of zero points would be awarded for any criterion which "is not in substantial accord with the PON requirements." (Ibid.)

14. In response to PON 401, the Commission received 16 proposals from public entities and joint powers groups, including Real Party in Interest, Western Riverside. (Vol. III, Tab D34, p. 714.)

15. Western Riverside's proposal expressly refused to comply with the Loading Order: "[T]he program does not require or offer financing for energy efficiency that will achieve at least 10% reduction in total energy use as a condition of financing on-site solar electric or other renewable generation...." (Id., p. 835.) Since Western Riverside refused to comply with the Loading Order requirement, it received a score of zero for that criterion, and, as required by the PON, was disqualified.

16. On February 10, 2010, the Commission issued a Notice of Proposed Awards, announcing the planned award of contracts to five of the sixteen bidders. (Id., p. 714.) Western Riverside was not one of the five successful bidders.

17. On February 23, 2010, Western Riverside faxed its detailed statement of protest to the Department of General Services (General Services). It was not timely received. (Vol. I, Tab D7, p. 148.)

18. On March 1, 2010, General Services sent Western Riverside a letter, dated March 1, 2010, stating that Western Riverside's protest was rejected as untimely. (Vol. I, Tab D2, p. 89.)

Procedural History

19. On April 1, 2010, Western Riverside filed with Respondent Riverside County Superior Court (Superior Court), a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, naming the Department of General Services and the Commission as Defendants and

Respondents. In that petition, Western Riverside asked the Superior Court to compel General Services to hear Western Riverside's protest, and to stop the Commission from performing any of its obligations in the contracts awarded under PON 401 until General Services has adjudicated Western Riverside's protest. (Vol. I, Tab D1, pp. 84-85.)

20. Though irrelevant to the issues before the court at that time, which were limited to whether General Services' dismissal of Western Riverside's protest was appropriate, Western Riverside relied heavily upon, and the court was apparently swayed by, the fact that Commission staff inadvertently used the wrong form letter, and therefore initially provided Western Riverside with the wrong explanation for its disqualification from the solicitation. (Vol. I, Tab D3, pp. 94.) Western Riverside argued repeatedly that the error, which was corrected in one day with an apology, somehow demonstrated nefarious intentions by the Commission. (Ibid.; see also, e.g., Vol. I, Tab D3, p. 102; Vol. I, Tab D5, pp. 131-134; Vol. IV, Tab D40, pp. 872-873.)

21. On April 21, 2010, the Superior Court granted a preliminary injunction in favor of Western Riverside. The Superior Court also set a briefing schedule for the writ of mandate. (Vol. I, Tab D14, pp. 298)

22. On May 21, 2010, the Superior Court granted a writ of mandate in favor of Western Riverside. In spite of General Services' staff members' testimony that they were watching the fax machine and no detailed statement had arrived, that Western Riverside's own fax machine imprinted the time of 1732 (5:32 p.m.) on the bottom of the fax that General Services ultimately received, and that General Services expressly allowed Western Riverside to file its statement by fax on condition that General Services assumed no responsibility for faxes not timely received, the Superior Court ruled that protest was timely and that General Services was obligated to hear the protest. (See Vol. II, Tab D29, p. 496.) The

Superior Court did not assess whether General Services' determination that the statement was untimely was arbitrary and capricious.

23. The order was signed and dated at that time. The order forbade the Commission, by way of writ of mandate, declaratory order, and injunctive relief, from performing any of its obligations under PON 401 and the contracts awarded under it until General Services considered and adjudicated Western Riverside's protest. (Vol. IV, Tab D45, p. 937.)

24. On June 10, 2010, General Services and the Commission appealed the writ of mandate. (Notice of Appeal, Vol. IV, Tab D37, p. 853.)

25. Also on June 10, 2010, the Commission filed a motion for a stay of the injunction against the Commission pending appeal. The motion for stay requested that the Superior Court: (1) confirm that the order is automatically stayed pending appeal by Code of Civil Procedure ("CCP") section 916, and reject any attempt by Western Riverside to make a showing under CCP section 1110b to have such stay lifted, or (2) grant a stay pending appeal on the showing made in support of the motion. (Vol. II, Tab D32, p. 527.)

26. On June 22, 2010, Western Riverside filed an opposition to the motion to stay. (Vol. IV, Tab D40, p. 846) On June 28, 2010, the Commission filed a reply to Western Riverside's opposition. (Vol. IV, Tab D41, p. 876.)

27. In support of its motion for stay, the Commission alleged, and Western Riverside did not submit evidence to rebut, a variety of equitable considerations related to whether a stay should issue. These included: (a) that the federal deadlines did not allow time for the legally required process for General Services to hear the protest, and if successful, for the Commission to clarify the regulations, and undertake a new solicitation that would allow Western Riverside to compete, and that effectively, even if

Western Riverside prevailed in showing its disqualification was wrong, there was no way to get Western Riverside back into the solicitation; (b) objective scoring criteria, such as the energy savings per dollar of stimulus money, number of jobs to be created, and amount of non-federal money leveraging the applicant's proposal, demonstrated that its proposal paled in comparison to the five winning bidders, and therefore, even if not disqualified, Western Riverside was unlikely to receive an award; (c) the five winning proposals would have leveraged an additional $370 million, and yielded to California 4,435 new jobs, which if not timely encumbered would disappear; (d) the only remedy factually available to Western Riverside was damages, which was equally true whether or not the writ was stayed. (Vol. II, Tab D33, p. 531.)

28. On July 2, 2010, the Superior Court held a hearing on Commission's motion for stay. (Vol. IV, Tab 43, p. 901.) At the outset of the hearing, the Superior Court expressed its finding that the Commission's motion was not brought in good faith, that the Commission's reference to the federal deadlines to encumber the ARRA funds constituted a "veiled threat", and that the motion was an untimely motion for reconsideration. (Id., p. 902.)

29. The Superior Court ultimately acknowledged it had equitable authority to stay its own order under section 918. In response to the court's question: "*So should I not take into consideration the potential harm to Californians?*", Western Riverside responded: "*No...not today....*" (Id., p. 905.)

30. The Superior Court thereafter denied the Commission's motion, ruling that: (1) the court's injunction was prohibitory and therefore not automatically stayed pending appeal; (2) the injunction is severable from the writ of mandate, which is automatically stayed pursuant to Code of Civil Procedure section 916; and (3) Western Riverside's Motion to

Strike the evidence presented by the Commission to allow the court to consider the relative equities was granted so that it would not be part of the record on appeal; but that (4) such evidence was considered by the court for purposes of considering the motion for a stay, and (5) the Commission's request for a discretionary stay under Code of Civil Procedure section 918 based on the relative harm to the State of California and Western Riverside was denied. (Id., pp. 926-929.)

31. In so ruling, the court inexplicably stated: "*The status quo is the money has not been disbursed, and it will not be disbursed until this matter is cleared upon an appeal.*" (Id., p. 926.) The record contains no evidentiary or legal basis for this statement.

32. In response to questions from the Commission about the judge's statement, the court confirmed that the order enjoining the Commission from performing its obligations under PON 401 was limited to executing and performing contracts awarded under PON 401 and that he was expanding his ruling, but refused to clarify whether his statement implied that he would consider cancelling the solicitation to be a violation of his order, because that issue had not been placed before the Court. (Id., p. 928-929.)

Intervening Federal Events

33. On May 5, 2010, several months before the stay hearing, Fannie Mae and Freddie Mac issued letters concluding that PACE and PACE-like programs (such as PON 401) run contrary to their Uniform Security Instrument prohibitions against senior liens. (Vol. V, Tab 56(a)(2)(g), pp. 1316, 1317.)

34. On July 6, 2010, the next business day after the stay motion, the Federal Housing Finance Agency (FHFA) adopted Fannie Mae and Freddie Mac's position, and released a statement opposing PACE financing

on properties carrying mortgages purchased or to be purchased by them. The Agency acknowledged the legal authority of states and municipalities to place tax assessments, but opined that the seniority of the assessments renders the repayment of first mortgages less secure. The agency also opined that such liens may run counter to Uniform Security Instrument prohibitions on attaching liens with a senior priority to relevant properties. (7/16/10 Agenda Memorandum, FHFA Letter Vol. V., Tab D56(a)(1)(f), pp. 1316-1347.)

35. The FHFA's statement immediately jeopardized not just the PACE financing proposals submitted under PON 401 – including the five successful applicants and Western Riverside's – but all PACE financing programs nationwide. PON 401 had expressly sought proposals for projects utilizing first-priority PACE financing, and now a legal cloud dampened the legal viability of that essential element of the competitive solicitation. (Vol. V., Tab D56(a)(1)(f), pp. 1291-1292.)

36. In response to the FHFA statement, numerous public officials in the executive and legislative branches of the federal and state government, including the Commission, promptly announced continued, vigorous support of PACE financing.

a. The California Attorney General, with full support by the Governor, filed a lawsuit against the FHFA for a declaratory judgment that PACE financing involves assessments and not loans, and to enjoin adverse action against any mortgagee who is participating in a PACE financing program. (Vol. V., Tab D56(a)(1)(f), (g), (h) pp. 1324-1358.)

b. The California Public Utilities Commission and the Commission both asked the California Congressional Delegation for leadership to reverse the effect of the

FHFA determination, to ensure that residential energy efficiency and renewable energy investments were not underutilized and allowed to reach their maximum potential in the state. (Vol. V., Tab D56(a)(2)(g), pp. 1360, CPUC Letter dated July 13, 2010.)

c. A delegation of twenty-six (26) members of the Assembly called upon the California Congressional delegation to save PACE, deeming it too important from the perspective of job creation and economic recovery to suffer under the FHFA's conclusion. (Id., at 1367.)

d. Western Riverside itself actively supported House of Representatives bill number 5766, which would have directed FHFA and other federal regulators not to block commercial or residential PACE programs. (Vol. VIII, Tab G, p. 2225, Staff Report of Barbara Spoonhour, attached as Exhibit 6.B to Western Riverside Executive Committee Agenda, dated August 2, 2010, p. 308)

e. The Commission reiterated its continued support of PACE financing at three Business Meetings. (Vol. V, Tab D56, p. 1444, Vol. VI, Tab D56(a)(3), (b)(3, (c)(3), pp. 1452, 1459, 1470, 1471.)

37. Even so, federal and state officials reluctantly acknowledged that due to the expedited deadlines for encumbrance and expenditure of ARRA funding, SEP monies needed to be redirected expeditiously to viable non-PACE programs to avoid the cloud cast by the FHFA.

a. The U.S. Department of Energy (DOE) announced that prudent management of the Recovery Act funds compels DOE and Recovery Act grantees to consider alternatives

to programs in which the PACE assessment is given a senior lien priority. (Vol. V, Tab D56(a), p. 1323.)

b. The Chair of the Governor's Recovery Task Force called upon the Commission to adapt to the changed regulatory landscape and immediately redirect the SEP funds in a manner that prioritizes expediency and viability, to avoid rescission of the money to the federal government. (Vol. V, Tab 56, pp. 1322-1323.)

Redirecting the Funds

38. Since projects implementing PACE financing were no longer legally feasible, on July 16, 2010, the Commission noticed a proposed cancellation of PON 401 including the five successful awards proposed thereunder. (Vol. V, Tab D56(a)(1), p. 1261.). An action item for the proposed cancellation was set for the Commission's Business Meeting on July 28, 2010. (Id., at 1268.)

39. Also on July 16, 2010, the Commission published proposed amendments to the SEP Guidelines, which would expand the kind of eligible municipal financing programs to include alternative forms of financing that did not involve a first-priority property lien, such as subordinate and/or unsecured loans, and would also facilitate the statewide adoption of first lien PACE financing to the extent that PACE were to become feasible again on the scale that was contemplated by PON 401. The proposed amendments to the Guidelines would also provide the Commission with added flexibility to expedite the reallocation of SEP funds, specifically authorizing the use of noncompetitive bid agreements with governments, or funding loan loss reserve accounts or other existing energy conservation loan programs. To ensure maximum transparency and invite stakeholder participation and comment in the funding decisions, the

proposed Guidelines amendments provided that the Commission would publicly notice its plans to redirect the funds consistent with the requirements of the Bagley-Keene Open Meeting Act beginning at Government Code section 11120. (Vol. V., Tab D56(B)(2)(a), p. 1537.) An action item for the proposed amendments to the Guidelines was set for the Commission's Business Meeting on August 6, 2010. (Vol. VI, Tab D56(b)(1), pp. 1530-33, 8/6/10 Business Meeting Agenda) The notice for the proposed amendments to the Guidelines required all written public comment to be submitted by July 30, 2010 at 5:00 p.m. (Vol. VI, Tab D56(b)(1), pp. 1534, 8/6/10 Notice of SEP Guidelines Amendments.)

40. On July 28, 2010, at the public Business Meeting, the staff of the Commission proposed that PON 401 and the five successful awards be cancelled, due to the FHFA determination against PACE financing. During the consideration of the matter, five members of the public appeared and presented comment. Western Riverside was provided notice, but did not appear. At the hearing's conclusion, all five Commissioners expressed support for PACE financing projects, yet reluctantly cancelled PON 401 and the five successful awards. (7/28/10 Business Meeting Transcript, Vol. V-VI, Tab D56(a)(3), pp. 1444, 1452, 1459, 1470-72.)

41. Immediately after the Commission cancelled PON 401, all applicants to PON 401 including Western Riverside received written notice of the cancellation. (Vol V, Tab D52, p. 1029-47.)

42. On August 2, 2010, unbeknownst to the Commission, Western Riverside's Executive Committee received a staff report from Barbara Spoonhour on the status of PACE and difficulties with FHFA and other federal regulators. (Vol. VIII, Tab G, pp. 2224-27, Staff Report of Barbara Spoonhour, Exhibit 6.B. to Western Riverside Executive Committee Agenda, dated August 2, 2010.) The report refers to and prospectively endorses the Commission's planned cancelation of PON 400-

09-401 because of difficulties with FHFA. (Id., at 2225) Among other things, the staff report states:

> WRCOG staff recommends cancellation of PON 09-401 because the 400-09-401 solicitation only allowed for financing through first-priority liens, such as PACE, which FHFA has opined violates the Fannie May (sic) and Freddie Mac Uniform Security Instrument prohibitions against senior liens.
>
> This PON is where WRCOG has initiated legal action against [General Services] and the [Commission] regarding the [Commission's] disqualification of a grant proposal submitted WRCOG in December 2009.

(Id., at 2226)

43. The Commission received two sets of written comments before the July 30, 2010, deadline for the proposed amendments to the SEP Guidelines. Both sets made general statements in support of PACE financing, and acknowledged that the Commission must adapt in the face of the FHFA statement. Neither offered suggestions on the text of the proposed amendments. (Vol. VI, Tab. D56(b)(2)(e), pp. 1606, 1609, Letters from Union City and Ventura Mayors.)

44. The Commission received two sets of belated written comments after the July 30, 2010, deadline for the proposed amendments to the SEP Guidelines, but before the August 6, 2010, Business Meeting. Both sets made general statements in support of the Commission's steps to adapt to alternative financing programs. Neither offered suggestions on the text of the proposed amendments. (Vol. VI, Tab. D56(b)(2)(g), (i), pp. 1611, 1616, Letters from Mayor Kevin Johnson and Sun Run.)

45. In spite of Western Riverside's own acknowledgement that FHFA actions and direction by the Department of Energy compelled the Commission to cancel the solicitation, and Western Riverside's own endorsement of the cancellation, on August 5, 2010, the Commission

received a letter from counsel for Western Riverside. The letter contained unsubstantiated allegations about the Commission's purported intentions in redirecting the funding. Nothing in the letter mentioned the proposed amendments to the SEP Guidelines, scheduled for the next day. (Vol. VI, Tab. D56(b)(2)(h), p. 1613.) The Commission's Chief Counsel responded in writing on August 18, 2010, refuting Western Riverside's allegations and articulating the Commission's lawful, discretionary exercise of its authority to redirect the ARRA funding. (Vol. VIII, Tab K, pp. 2250-52.)

46. On August 6, 2010 at the public Business Meeting, Commission staff proposed that the Commission adopt the Proposed Third Edition of the SEP Guidelines, as posted on July 16, 2010. During the consideration of the matter, two members of the public appeared and presented comments. Other than its August 5th letter, Western Riverside did not appear at the hearing. In addition, staff made a presentation previewing a conceptual program that it was considering proposing at a later date to the Commission, as an alternative to the PACE financing projects recently cancelled. Staff delivered a summary of "Energy Upgrade California," a comprehensive, statewide energy efficiency program sponsored in collaboration by the Commission, the California Public Utilities Commission, and private and municipal utilities across the state. Energy Upgrade California – still on the drawing board – would offer a suite of services and resources to property owners and local governments to facilitate energy efficiency projects in existing residential and commercial buildings, including but not limited to alternative financing products, rebates for energy audits, technical standards for quality assurance, information about qualified installation contractors, and scholarships for workforce development participants. A statewide, centralized web portal would aggregate the information to stakeholders with marketing, education and outreach to consumers. At the conclusion of the presentation, the

Commission voted to adopt the revisions to the SEP Guidelines. (Business Meeting Minutes 8/6/10, Vol. VI, Tab D56(b)(4), p. 1659, Transcript 8/6/10, Tab D56(b)(3), pp. 1623-48.)

47. On September 9, 2010, the State Attorney General, as counsel for General Services, filed a return, notifying Western Riverside that due to the cancellation of PON 401 General Services no longer had the legal authority to hear a protest under Public Contract Code section 10345, and that General Services would take no further action on the protest and considered the Superior Court's May 21, 2010, order moot. (Vol. IV, Tab D 52, p. 1046.) Western Riverside did not respond to this notice.

48. On September 22, 2010, the Commission posted public notice of proposed Contract 400-10-003 for $33,176,912 in ARRA funds to California Statewide Communities Development Authority (CSCDA), a joint powers authority, to establish Energy Upgrade California. The back-up materials for the proposed action were also posted for public review, and included a complete draft of the contract, including detailed scopes of work and budgets for CSCDA and all major subcontractors. An action item for the proposed contract was set for the public Commission Business Meeting on September 22, 2010. (Vol. VI, Tab D 56(c)(1), p. 1662; Vol. VI, Tab D56(c)(2), p. 1667.)

49. Also on September 13, 2010, unbeknownst to the Commission, the Western Riverside Executive Committee's own staff informed it that:

> [D]espite PACE's great promise, the Federal Housing Finance Agency (FHFA) and the Office of the Comptroller of the Currency (OCC) on July 6th issued statements that immediately forced existing PACE programs to halt operations and froze the development of dozens of PACE programs nationwide.
>
> As a result, residential PACE financing cannot move forward at this time.

> Because of the [Fannie and Freddie] notification, the process and schedule [of WRCOG's Program] are now held up for an undetermined amount of time for the residential side of the Program.
>
> However, if Freddie Mac and Fannie Mae follow through . . . the action would effectively stop WRCOG's Program.
>
> WRCOG's . . . Program . . . hinge[s] on the fact that [PACE] loans must be superior to mortgage loans, or identify some other loan guarantee process to allow for . . . these loans to work.
>
> The California Energy Commission adopted a resolution to cancel Program Opportunity Notice (PON) No. 400-09-401 (Municipal Financing Program), and Notice of Proposed Awards, in response to direction of the United States Department of Energy (DOE).

(Western Riverside Executive Committee Staff Report, Vol. VIII, Tab H, pp. 2233.) Thus, Western Riverside recognizes that not only were the Commission's actions not based on some ulterior motive, but were compelled by Department of Energy in response to the FHFA directives.

50. At the Commission's Business Meeting on September 22, 2010, staff proposed approval of Contract 400-10-003 with CSCDA. Staff delivered a presentation of Energy Upgrade California, the comprehensive, statewide energy efficiency retrofit program. Staff described the objectives of the program, the thirteen key elements as described in the August 6, 2010, presentation to the Commission (Vol VI, Tab D56(c)(s)(d), p. 1669), and the key partners to be named as major subcontractors, all incorporated into the draft contract.

51. At the Business Meeting on September 22, 2010, no members of the public requested the opportunity to comment. The Chair of the Commission read into the record the names of several mayors of cities who commented on the proposed contract, and staff provided the Commission with factual responses to address the few concerns raised in those letters.

Western Riverside did not appear. At the conclusion of the presentation, the Commission voted to approve the contract with CSCDA. (Vol. VII, Tab D56(c)(3), p. 1966, (4).)

Belated Actions by Real Party in Interest

52. On October 5, 2010 – after failing to appear in three publicly noticed proceedings concerning the redirection of ARRA funds from PON 401 – counsel for Western Riverside sent a letter to the Commission stating that "similarities abound" between the five cancelled awards under PON 401 and Contract 400-10-003. On that basis, Western Riverside asserted that Contract 400-10-003 was "based on the solicitation process for [PON 401]" and therefore a violation of the Superior Court's May 21, 2010, order which "prohibited [the Commission] from awarding funds ... unless and until [General Services] properly adjudicated [Western Riverside's] protest under Public Contract Code section 10345." Western Riverside's position ignored the August 18, 2010, letter from the Commission, and the September 9, 2010, letter from State Attorney General concluding that General Services no longer possessed any legal authority to hear the protest and considered the May 21, 2010, order moot. (Vol. IV, Tab D53, p. 0001085, BBK Letter.)

53. On October 12, 2010, Western Riverside served on the Commission notice of its Ex Parte Application for Temporary Restraining Order and Order to Show Cause re Contempt. The Superior Court held oral arguments on the ex parte application on October 13, 2010, and October 14, 2010. (Vol. IV, Tab D53, p. 1048; Vol. V, Tab D54, p. 1215; Vo. VIII, Tab D57, p. 2102.)

54. At oral argument, the Superior Court stated that any suggestion that Western Riverside failed to exhaust its administrative remedies "falls on deaf ears." (Vol. V, Tab D54, p. 1240.)

55. On October 14, 2010, the Superior Court granted Western Riverside's request for a Temporary Restraining Order and Order to Show Cause. (Vol. VIII, Tab D59, p. 2162.)

Summary of Energy Upgrade California Contract 400-10-003

56. Because the FHFA had rendered priority lien PACE financing mechanisms all but impossible, and since PON 401 required successful applicants to establish PACE financing programs, the Commission was forced to cancel PON 401 and redirect the SEP funding to alternative municipal financing projects that did not run afoul of the federal regulatory agency.

57. With the ARRA funding freed up from the cancelled solicitation and the imminent need to encumber the funds, the Commission built upon developments in energy efficiency financing over the previous year, including lessons learned from PON 401, to create a comprehensive, statewide energy efficiency retrofit program that is not dependent upon first-priority PACE-like financing. The program is called Energy Upgrade California, as conceived by a collaborative effort including the California Public Utilities Commission, and private and public utilities throughout the state, which was commenced at least as of March 2010 (8/6/10 Business Meeting tr., Vol. VI, Tab D56(b)(3), p. 1619, 1623-25.)

58. In its ex parte application for a temporary restraining order and order to show cause, however, Western Riverside argued, and the Superior Court agreed, that because there are some "similarities" among the recipients and funding amounts between Contract 400-10-003 and the five successful awardees under PON 401, that those similarities amounted to evidence of a "shell game" to do an end-run around the Court's injunction. (Vol. VIII, Tab D57, pp. 2102, 2120, 2124-25.) Assuming the writ somehow could limit the Commission's discretion in creating a substitute

program, the court undertook no particularized examination or comparison of the differences between the services required under either program. As detailed here, nothing was improper about the Commission's approval of Contract 400-10-003.

59. To expedite the funding and ensure encumbrance by the October 21, 2010, federal deadline, the Commission exercised its authority under Public Contract Code section 10340 and the revised SEP Guidelines to pursue a noncompetitive bid contract with a government agency with statewide jurisdiction and the administrative capacity to carry out the program. The Commission expressly authorized noncompetitive contracts in the revised guidelines because inadequate time existed to undertake a new request for proposals and public solicitation before October 21, 2010. Western Riverside did not object to the revised guidelines. (Vol. VII, Tab D56(b)(3), pp. 1984-1995.)

60. Contract 400-10-003, as posted for public review on September 13, 2010, spells out the framework, goals and objectives of Energy Upgrade California (Vol. VI, Tab D(c)(2), pp. 1669-1670). The program is vastly different from the five independent projects proposed under PON 401.

61. Under PON 401, the Commission had proposed to fund:

a. The County of Sacramento to implement a bond-funded, PACE financing program called CaliforniaFIRST in 14 participating counties. Under this award, the County of Sacramento would have received $16,499,050 (Vol. III, Tab D34, p. 714, NOPA), which included major subawards to the 14 participating counties, a nonprofit named Ecology Action to perform grant administration, and a private company Renewable Funding, to assist with the financing strategies. (Vol. IV, Tab D53, p. 1162.)

b. The County of Humboldt, to establish an energy efficiency PACE program in the North Coast. Under this award, the County of Humboldt would have received $4,384,349. (Vol. III, Tab D34, p. 714.)

c. The San Francisco Public Utilities Commission (City and County of San Francisco) to establish the GreenFinanceSF PACE Program to sell microbonds for residential retrofit projects to bond buyers. Under this award, San Francisco would have received $2,080,000. (Ibid.)

d. The County of Sonoma, to broadly fund its "Sonoma County Energy Independence Program" to further improve its already-established PACE financing program. Under this award, the County of Sonoma would have received $2,537,000. (Ibid.)

e. The City of Los Angeles to fund a PACE financing program for commercial buildings. Under this award, the City of Los Angeles would have received 4,676,513. (Ibid.)

62. In contrast, under Contract 400-10-003, the Commission proposes to make a single award for $33,176,912 to CSCDA to serve as lead administrator of the Commission's Energy Upgrade California.

a. Fundamentally, CaliforniaFIRST, which had been proposed by CSCDA under PON 401, no longer exists because the FHFA ruling undermined its legal viability. Where CaliforniaFIRST was structured primarily around bond financing strategies for municipal financing programs, Energy Upgrade California is a comprehensive program that includes essential elements including but not limited to: statewide standards for energy audits and

energy retrofits; quality assurance for installations; statewide outreach and marketing, including an integrated web portal; workforce development; adherence to the Loading Order for renewable energy projects; consumer rebates and incentives; and funding for alternative financing mechanisms other than PACE. Not one cent of the funding in Contract 400-10-003 is for CaliforniaFIRST. (Vol. VII, Tab D56(2)(d), p. 1813, and D56(c)(3), p. 1984-1995.)

b. Energy Upgrade California proposes to invest substantial resources in a statewide web portal designed to be a "one-stop shop" for consumers, to centralize all available federal, state and local information about energy efficiency projects, such as: how to get an energy audit; the availability of incentives and financing; and qualified installation contractors. The web portal would include an option for consumers to directly apply for available financing products. (Ibid.)

c. Many of the services and benefits are intended to be available to all consumers in all fifty-eight counties.

d. A select set of services, including credit enhancements and regional coordination, will be directed to approximately thirty (30) "program plus" counties which have already invested in municipal energy efficiency programs – including Riverside County. (Ibid.)

e. In addition, the Commission desired to identify whether there were any PACE financing projects that could be viable, notwithstanding the FHFA statement.

63. To design and carry out these statewide services, the Commission sought a team of public and private partners with demonstrated leadership and expertise in areas of public contract administration, energy efficiency, financing strategies, education, outreach, and web development.

64. Based on all information available to the Commission, it determined that it would solicit participation as major subcontractors to CSCDA from:

a. Ecology Action to assist with marketing, education and outreach;

b. Renewable Funding to assist with financing products and strategies;

c. Renewable Funding and MIG to design and launch the statewide web portal;

d. The County of Sonoma to pursue its established PACE program for residential buildings that avoids the FHFA ruling because several local lenders have already agreed to accept the risk by holding onto the loans rather than selling them to secondary, federally-backed markets such as Freddie Mac and Fannie Mae; and

e. The City of Los Angeles, the City of San Francisco, and Placer County to pursue their PACE programs for commercial buildings, whose mortgages are not subject to the jurisdiction of FHFA.

f. As "pilot projects," the County of Sonoma and City of Los Angeles will work with other interested local governments across the state to replicate those programs.

65. The Commission exercised its lawful discretion in procuring the contract for specialized services to implement Energy Upgrade California.

a. The Commission learned about the relative expertise and capacities of potential team members through a number of sources and venues, including but not limited to: the collaborative effort to develop Energy Upgrade California which began many months before the FHFA undermined PACE programs; the sixteen applications submitted for PON 401; and applications submitted for various other solicitations for ARRA funding being conducted by the Commission.

b. There is nothing improper about the Commission's considering any of these sources of information in selecting the very best entities for the performance of these specialized services.

66. Out of the hundreds of pages of Contract 400-10-003 detailing the scopes of work and budgets for CSCDA and each of the major subcontractors, it is insufficient for Western Riverside to simply point to "similarities" between the recipients and six budget line items as the basis for a claim that the Commission cancelled PON 401 "in name only behind the mantel of using their [sic] discretion to cancel a contract and simply use another vehicle for awarding substantially the same amounts to the same people." (Vo. VIII, Tab D57, 10-14-10 Hrg. Tr., pp. 2119-2120.) The argument ignores the substantially different nature of the services required by the Commission and the overall contract to suggest that the Commission acted outside its lawful agency discretion to expeditiously distribute the ARRA funding. In fact, such a claim ignores the mountain of publicly available evidence that demonstrates that Energy Upgrade California is an

innovative project with statewide impact, and starkly different from the five locally-generated, stand alone projects selected under PON 401. The allegation is especially appalling from Western Riverside, given that it acknowledged both that its own program was stalled due to the FHFA actions, and that the Commission's cancellation of PON 401 was pursuant to the direction of the United States Department of Energy.

BASIS FOR RELIEF

Errors in the Superior Court's Decision

67. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, because the Commission did not violate the May 21, 2010 injunction.

a. The May 21, 2010 injunction did not prohibit the Commission from cancelling PON 401. The Superior Court confirmed that 1) Western Riverside had not placed that issue before the court (7/2/10 transcript Vol. IV, Tab D44, p. 928.), and 2) the Commission retained its independent discretion to cancel the solicitation (10/14/10 transcript, Vol. III, Tab D57, pp. 2119-20.)

b. The May 21, 2010 injunction did not prohibit the Commission from redirecting the underlying funds from PON 401 through a new procurement process consistent with its statutory authority. The injunction was expressly limited to the performance of the Commission's obligations in the contracts awarded under PON 401. (Order 5/21/10, Vol. IV, Tab D45, p. 937.)

68. The Superior Court erred and abused its discretion in finding that the May 21, 2010 order implicitly enjoined the Commission's approval of Contract 400-10-003.

a. That subsequent contract was not within the Commission's obligations in the contracts awarded under PON 401, and any ambiguity in the injunction is to be resolved in favor of the Commission.

b. Such an order would be in excess of the Superior Court's jurisdiction, would violate the separation of powers between the judicial and the legislative and executive branches, and would violate the Commission's independent discretion and responsibility to execute public statutes including Public Resources Code section 25463, subdivision (b) to "maximize the commission's ability to utilize and award federal [SEP] funds expeditiously and in accordance with the American Recovery and Reinvestment Act of 2009."

69. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause based on its disagreement with the manner in which the Commission exercised its independent and lawful discretion.

a. The Superior Court indicated that it would not have issued the orders if the Commission had utilized a competitive bid solicitation to redirect the funding. (10/13/10 Transcript, Vol. V, Tab. D54, p. 1230-34.) In other words, the court implicitly asserted the authority to mandate that a competitive solicitation be conducted even though Public Contract Code section 10340 subdivision (b) subsection (3) authorizes the Energy Commission to enter into contracts with another state agency or local government entity without conducting a competitive solicitation.

b. Western Riverside did not, and indeed could not, challenge the Commission's statutory authority under Public Contract Code section 10340 to enter into noncompetitive bid contracts with governmental agencies under specified conditions.

70. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, by determining that the Commission's exercise of its discretion in cancelling PON 401 was "in name only", and that developing Contract 400-10-003 was a "shell game," without considering the substantial evidence presented to the court that established the federal compulsion to cancel PON 401, as well as the distinct differences in scope, goals, objectives, tasks and funding between the contract for Energy Upgrade California, as compared to the five stand-alone local projects selected under PON 401.

71. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, because the Superior Court cannot compel the Commission to proceed with a solicitation and enter into contracts for services that the Commission determines in its lawful exercise of discretion that the People of the State of California cannot use. More, the Commission cannot be found to have willfully violated the May 21, 2010, writ, as is required to issue an order to show cause. The May 21, 2010, order was rendered moot as a matter of law by the cancellation of PON 401 – which was within the Commission's lawful discretion and not in violation of the writ. The writ stated:

> *"The [Commission is ordered] to stay its performance on the contracts awarded under PON No. 400-09-401, pursuant to the [Commission's] legal duty mandated by Public Contract Code section 10345, until [General Services] adjudicates [Western Riverside's] protest."*
>
> ...

> *"The [Commission] is hereby enjoined from performing any of its obligations in the contracts awarded under PON No. 400-09-401, including its expenditure of any funds under the PON, until [General Services] has properly adjudicated [Western Riverside's] protest pursuant to Public Contract Code section 10345."*

(Vol. II, Tab. D29, p. 497.) Nothing in the writ purported to assert continuing jurisdiction over the ARRA funds if the solicitation was cancelled; it expressly was limited in accordance with section 10345 to to proceeding with contracts under the PON while a protest is pending. Upon cancellation of PON 401, General Services lost legal authority under Public Contract Code section 10345 to hear Western Riverside's protest, dissolving the subject matter of the writ of mandate against General Services. No authority was cited, and none exists, that allows such a retroactive modification of a writ via an order to show cause re: contempt. No authority was cited, and none exists, for the Superior Court to usurp the discretion of the Commission in determining how to respond to federal banking regulations that fundamentally alter the need for energy efficiency services under a contract solicitation. When General Services lost authority to hear the protest, the contingency upon which the injunction against the Commission was predicated no longer existed. (5/21/10 Order, Vol. II, Tab. D29, p. 496.)

72. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, because Western Riverside failed to meet its burden to demonstrate that it would likely prevail on the merits of the charge of contempt. Because the May 21, 2010, order was moot, and because the approval of Contract 400-10-003 was outside the injunction, Western Riverside cannot prevail on the merits of its claim that the Commission violated the Superior Court's May 21, 2010 order.

73. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, because it failed to weigh the relative interim harm in the issuance of the restraining order.

a. Western Riverside offered no evidence of harm, simply saying that it is "unquantifiable."

b. Any harm to Western Riverside is imposed by the FHFA ruling which renders its proposed project infeasible, not based on the outcome of an adjudication of Western Riverside's protest. Assuming, hypothetically, that the Commission had selected Western Riverside's project for funding – either initially or as a result of the adjudication of the protest – it would have been lawfully cancelled along with all the successful applicants under PON 401 when the FHFA determined that PACE projects violate uniform security instruments. Therefore, the temporary restraining order cannot prevent any harm that Western Riverside does not, or would not, already suffer. (10/14/10 Transcript, Vol. VIII, Tab. D57, p. 2109.)

c. Not later than September 13, 2010, Western Riverside knew that its own PACE program was stalled at the hands of FHFA (and not the Commission), as evidenced by Western Riverside's staff report to its Executive Committee, which acknowledges that enforcement by Freddie Mac and Fannie Mae will "effectively stop [Western Riverside]'s Program." That same staff report further acknowledges that the Commission cancelled PON 401 due to FHFA's actions and direction by the Department of Energy. Western Riverside thus admitted

it was *not* to end-run the Superior Court's order. (Western Riverside Executive Committee Agenda and Staff Report, 9/13/10, Vol. VIII, Tab H, pp. 2236-38.)

d. In contrast, the Commission established that the harm to the State of California from the potential loss of $33,176,912 is significant and imminent, including the associated loss of green jobs, energy savings, and stimulus to local economies. (10/14/10 Transcript, Vol VIII, Tab D57, pp. 2109-10.)

e. The Superior Court acknowledged the significant, potential harm to citizens of California if the Commission is restrained from executing Contract 400-10-003. (Id. p. 2121.)

f. While acknowledging the harm to the public interest, and while failing to find any harm to Western Riverside that is prevented by its order, the Superior Court has issued a restraining order that does not in any way preserve a "status quo," and, in fact, the order may effectively change the status quo (the Commission's current ability to obligate these funds) by virtue of the passage of time if DOE takes back the funds on or after October 21".

74. The Superior Court erred and abused its discretion in issuing the temporary restraining order and the order to show cause, because it failed to acknowledge that Western Riverside had wholly failed to participate in the Commission's public proceedings from July 16, 2010, to present to redirect the ARRA funds, stating that any suggestion that Western Riverside failed to exhaust its administrative remedies "falls on deaf ears." (10/13/10 Transcript, Vol. V, Tab D54, p. 1240.)

No Other Remedy At Law

75. Left with no other adequate remedy at law, the Commission filed this Petition for Writ of Mandate, Prohibition and/or Other Appropriate Relief on October 18, 2010.

76. The Commission has exhausted its remedies before the Superior Court. The temporary restraining order issued October 14, 2010, extends to at least November 4, 2010, when the Superior Court will hear the order to show cause, well after the federal deadline to encumber the ARRA funds.

77. With the federal encumbrance deadline of October 21, 2010, looming just days away, there is no other adequate remedy for the Commission other than the relief sought here, including *inter alia* an immediate stay of the temporary restraining order.

Grounds for an Immediate Stay

78. An immediate stay is necessary to prevent significant harm to the State of California and to preserve the status quo. As demonstrated in the accompanying supporting memorandum, the Respondent Riverside County Superior Court erred and abused its discretion in issuing the temporary restraining order, order to show cause and underlying writ of mandate and injunction. The risk of significant economic and environmental harm to Californians from the potential loss of $33,176,912 in ARRA funding for energy efficiency projects justifies the immediate relief sought in this petition.

79. A copy of this petition and supporting documents were served on Real Party in Interest (Proof of Service.)

PRAYER

Wherefore, the Commission prays that this Court issue:

1) Pending this Court's ruling on this petition, an immediately stay under California Rules of Court, Rule 8.116, of the enforcement of the order issued by Respondent Riverside County Superior Court on October 14, 2010, as expanded orally at the hearing, *in toto*, including but not limited to:

   the temporary restraining order blocking the Commission from distributing $33,176,912 of ARRA funds, and the order directing the Commission to show cause on November 4, 2010, why it should not be held for contempt;

2) A peremptory writ of mandate, prohibition and/or other appropriate relief, in the first instance, including:

   a) A writ of prohibition enjoining Respondent from convening the contempt hearing, currently set for November 4, 2010;

   b) A writ of mandate directing Respondent to vacate its October 14, 2010, temporary restraining order and order to show cause regarding contempt in its entirety,

   c) a writ of mandate directing Respondent to discharge as moot, its May 21, 2010, order granting the writ of mandate by Real Party in Interest Western Riverside Council of Governments (Western Riverside) directing the Department of General Services to adjudicate Western Riverside's protest, and enjoining the Commission from performing its obligations under the solicitation, and directing the Respondent to dismiss with prejudice Case No. RIC 1005849, likewise as moot.

3) In the alternative, the issuance of an alternative writ, directing the Respondent to forthwith vacate its order of October 14, 2010, discharge its May 21, 2010, writ as moot, and dismiss with prejudice Case No.

Case No. RIC 1005849, likewise as moot, or appear and show cause why Respondent should not be compelled by this Court to do so, and upon return to the alternative writ, grant the relief prayed in paragraph 2), above;

4) That the Commission be deemed the prevailing party in this proceeding and the order to show cause proceeding below, and that costs be awarded to the Commission, and against the Real Party in Interest therefor; and

5) For such other and further relief as this honorable Court deems just.

Dated: October 17, 2010 Respectfully submitted,

CALIFORNIA ENERGY COMMISSION
Michael J. Levy, Chief Counsel

By: _____
Michael J. Levy

MEMORANDUM OF POINTS AND AUTHORITIES

I. Introduction.

This Memorandum demonstrates that this Court has the authority to, and should, grant the requested temporary stay and issue the requested writ, thereby allowing Petitioner California Energy Commission (Commission") to proceed with its award of 33 million dollars in energy-saving, job-creating money before the expiration of the federal deadline for encumbrance of the funds. The trial court's October 14, 2010 Temporary Restraining Order ("TRO"), and its Order to Show Cause ("OSC") of the same date, concerning the Commission's alleged violation of the court's May 21, 2010 injunction, are beyond that court's authority, have no support, and will cause extraordinary harm to the State of California.

II. Statement of Facts.

The facts of this case are discussed at pages 6 – 23 of the Petition and therefore are not restated here.

III. Argument.

A. This Court Has the Authority to Grant the Requested Relief.

1. The Immediate, Temporary Stay of the TRO. and the OSC.

Upon the filing of a petition for writ of mandate or prohibition with the Court of Appeal, the Court may, *inter alia*, grant a request for temporary stay. (Cal. Rules of Court, rules 8.116, 8.487(a)(4); see also *Markley v. Superior Court (San Bernardino)* (1992) 5 Cal.App.4th 738, 750, fn. 15.)

A temporary stay is appropriate when the petitioner demonstrates urgency. (Cal. Rules of Court, rule 8.486(a)(7)(A).) Because a temporary stay is, in effect, a form of injunctive relief, a court that has been asked for a temporary stay must evaluate two "interrelated" factors in determining whether the requisite urgency exists: "(i) the likelihood that the party seeking the injunction will ultimately prevail on the merits of his claim, and (ii) the balance of harm presented, i.e., the comparative consequences of the issuance and nonissuance of the injunction." (*Common Cause v. Board. of Supervisors* (1989) 49 Cal.3d 432, 441-442 (standard for preliminary injunctions).) Thus, a stay is appropriate where "the fruits of a reversal would be irrevocably lost unless the status quo is maintained," and especially where without the stay, the respondent would have the ability to render the appeal moot. (*People v. Emeryville* (1968) 69 Cal.2d 533, 537.)

Here, the Commission is likely to succeed on the merits of its claims, as demonstrated in detail by the remainder of this Memorandum.

In addition, the harm to the Commission (and to California as a whole) if the Court does not issue a stay is significantly graver than any possible harm to Western Riverside if a stay is issued.

In contrast, without the stay, the Commission will miss the federal deadline to encumber $33,176,912 in ARRA funding, thereby risking significant economic and environmental harm to California from the potential loss of that funding for energy efficiency projects. In addition, loss of funding following the lapsed October 21, 2010, deadline would

leave nothing to adjudicate, rendering any appeal moot. Thus, the balance of harms heavily weighs in favor of issuing a temporary stay.

Finally, as further set forth herein, and with particular regard to the OSC, two agencies of the Executive Branch of Government should not be held to answer for contempt where there is no lawful basis for the order to show cause, especially when the OSC betrays a clear intrusion into the Constitutionally- mandated separation of powers.

1. The Writ of Prohibition.

When there is no plain, speedy, and adequate remedy in the ordinary course of the law, an appellate court may issue to a trial court a writ of prohibition, on the verified petition of a person beneficially interested, arresting trial court proceedings that are without or in excess of jurisdiction. (Code Civ. Proc. §§ 1102, 1103; *Santa Clara County v. Superior Court (Santa Clara)* (1949) 33 Cal.2d 552, 559). All of the requisite factors are present.

No Ordinary Remedy. Due to the looming federal deadline of October 21, and the fast-approaching November 4 contempt hearing, there exists no speedy, and adequate remedy in the ordinary course of law, such as an appeal. (See *Kawasaki Motors Corp. v. Superior Court (Orange)* (2000) 85 Cal.App.4th 200, 206 (absence of speedy remedy via appeal).) In addition, appeal is an inadequate remedy because the federal funds could not be restored even if an appeal were successful.

Beneficial Interest. To be considered "beneficially interested," a party must have a special interest to be served or a particular right to be preserved or protected, different from the interest of the general public. (*State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674, 829.) Here, the Commission has a unique interest in preserving its right to lawfully exercise its authority, and a special interest in carrying out the

State's energy and job-creation policies via timely encumbrance of the ARRA funds.

Lack of Jurisdiction Below. Sections III.B.1 and III. C of this Memorandum, below at pp. 6 - 10 and 12 - 14, explain why the trial court acted in excess of its jurisdiction by issuing the TRO and the OSC.

Finally, while it is not required for a petitioner for a writ of prohibition to have raised a jurisdiction issue below (see *Monterey Club v. Superior Court (Los Angeles)* (1941) 48 Cal.App.2d 131, 143), the Commission did in fact do so here.

2. The Writ of Mandate.

A writ of mandate compels (a) the performance of an act that the law specifically enjoins as a duty from an office or (b) the admission of a party to a right to which the party is entitled and from which the party is unlawfully precluded. (Code Civ. Proc. § 1085; *Biosense Webster, Inc. v. Superior Court (Los Angeles)* (2006) 135 Cal.App.4th 827, 834 (mandate may be used to correct an abuse of judicial discretion).) As Sections III.B. and III.C., pp.6 - 14 below, demonstrates, the trial court acted without jurisdiction, abused its discretion, and prevented the Commission from exercising the legitimate authority given to it (a part of the Executive Branch) by the Legislature.

In addition, a writ of mandate must be issued on the verified petition of the party beneficially interested, when there is no plain, speedy, and adequate remedy in the ordinary course of law, and where the petitioner will suffer irreparable harm if the writ is not granted. (Code Civ. Proc. § 1086; *Interinsurance Exchange of the Automobile Club v. Superior Court (San Diego)* (2007) 148 Cal.App.4th 1218, 1225.) As we have just demonstrated, those factors are also present here.

Finally, although courts generally deny writ relief, a writ of mandate should not be denied when "the issues presented are of great public

importance and must be resolved promptly." (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 845.) We respectfully suggest that the potential loss of $33 million in federal benefits for California is an issue of great public importance that needs to be resolved promptly.

B. The Trial Court Abused Its Discretion in Issuing the TRO.

The TRO was unlawful for two independent reasons: (1) the court had no jurisdiction to restrain the Commission's authority and discretion, and (2) the record shows neither a substantial likelihood of success on the merits nor irreparable harm to Petitioner Western Riverside if the TRO were not granted, both of which are prerequisites to issuance of a TRO.

1. There Was No Jurisdiction to Issue the TRO, Because Neither Injunctive Relief nor Mandamus are Available to Control the Energy Commission's Lawful Exercise of its Authority and Discretion.

Even if a court has jurisdiction over the subject matter and the parties, it may not interfere with the lawful authority of a separate branch of government. Doing so violates the doctrine of separation of powers inherent in our tripartite form of government and is therefore in excess of a court's jurisdiction. (*Santa Clara County v. Superior Court (Santa Clara)* (1949) 33 Cal.2d 552, 559.) Thus both Code of Civil Procedure section 526, subdivision (b), and Civil Code section 3423, subdivision (d), state that a court cannot grant an injunction that prevents the implementation of a public statute by officers of the law for the benefit of the public. (See *Agricultural Labor Relations Board v. Superior Court* (1976) 16 Cal.3d 392, 401.)

Similarly, a court cannot enjoin state officers from exercising their discretion. (*Shamasian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 640; *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 506.)

In particular, mandamus cannot be used to compel the exercise of discretion in a particular manner or to order a specific result when the underlying decision is purely discretionary. (*U.S. Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 138.) Thus "[m]andate will not issue to compel action unless it is shown that the duty to do the thing asked for is plain and unmixed with discretionary power or the exercise of judgment." (*Unnamed Physician v. Board of Trustees* (2001) 93 Cal.App.4th 607, 618.)

The TRO improperly interferes with both the Commission's authority and its discretion to cancel PON 401, and to re-award the funds. We turn first to the Commission's authority.

a. The Commission Had the Authority to Cancel PON 401 and the Awards Made to the Successful Bidders and To Redirect the Funds to Contract No. 400-10-003.

The Commission was authorized by statute, regulation, and the terms of PON 401 itself to cancel PON 401 and the awards made thereunder, and to redirect the funds previously dedicated to that PON to other uses, including Contract No. 400-10-003.

First, the Commission has the general authority to take any action it finds reasonable and necessary to carry out its powers and duties, which are to be liberally construed. (Pub. Resources Code, §§ 25218, subd. (e), 25218.5.) Awarding the ARRA funds in its lawful discretion is one of those powers and duties.

Second, and more specifically, urgency legislation signed by the Governor on July 28, 2009 gives the Commission broad discretion to administer and distribute ARRA funds. (Stats. 2009, 4th Ex. Sess., ch. 11, sec. 22 (codified at Pub. Resources Code, §§ 25460 – 25463.) The statute

commands the Commission to make the awards as expeditiously as possible, and it emphasizes that the Commission's powers to award the funds must be liberally construed. (Pub. Resources Code, §§ 25640, subd. (b), 25463, subd. (b).) Furthermore, and critical to this litigation, the statute authorizes the Commission to adopt guidelines on the funding. (*Id.*, § 25462, subd. (a).) Those guidelines – in the Second Edition of the SEP Guidelines, which were in place prior to the cancellation of Program Opportunity Notice 401 – expressly gave the Commission the authority to cancel PON 401 and reallocate its funds if doing so was necessary to best achieve the goals of ARRA and state law.

Moreover, the language in PON 401 itself reserved the Commission's right to cancel the solicitation (i.e., the PON), and to reallocate the funds, if doing so was in the state's best interest. The PON also spoke directly to situations like the one presented in this litigation, stating that where a protest has been filed, contracts would not be awarded unless, among other possibilities, the Commission canceled the PON and began a new contracting process.

Pursuant to the authority described above, and in response to the actions of the FHFA, Fannie Mae, and Freddie Mac and the express recommendation of DOE, the Commission, in the best interests of the State of California and in order to achieve the goals of ARRA and state law, decided to cancel PON 401 and to reallocate the funds without going through the extended process of a competitive solicitation. The court below improperly interfered with the Commission's lawful exercise of its authority.

b. The Decision of the Energy Commission to Cancel PON 401 and Re-Award the Funds Was Purely Discretionary, and It Was Proper.

Awards of public contracts are reviewed under the "abuse of discretion" standard. (See *Ghilotti Construction Company v. City of Richmond* (1996) 45 Cal.App.4th 897, 903 - 904.) Yet in issuing the TRO and the OSC, the trial court has essentially compelled the Energy Commission to exercise its discretion in a particular manner (to use a competitive solicitation process if it intends to reallocate the funds previously allocated under PON 401). A temporary restraining order seeking to enforce a writ of mandamus cannot be used in this fashion.

Moreover, the Commission exercised its discretion entirely properly. Cancellation of PON 401 and re-allocation of the funds was necessary in order to use the ARRA funds at all, in a manner that would not violate the newly-established rules on municipal financing of energy programs, and that would meet the impending October 21st federal deadline. These were the *only* actions that could have preserved the $33 million in federal funds, and the concomitant energy-saving and job-creating programs, for California.

Indeed, the trial court itself seems to have acknowledged that it did not have authority to order the Commission not to cancel PON 401. (Vol. VIII, Tab D57, pp. 2122-23)The trial court has never based its actions on anything other than Public Contract Code section 10345, which contains very narrow grounds for the overturning of a contract award, certainly nothing that would limit the Commission's discretion as did the court below.

While the trial court took issue with the fact that cancellation of PON 401 mooted that part of the May 21 Order that ordered the Department of General Services to provide a protest hearing to Western Riverside, cancelling the solicitation was always within the lawful discretion of the Commission. Neither the trial court's May 21 Order, nor Public Contract Code section 10345, upon which the May 21 Order was based, contains any prohibitions or limiting criteria on the Commission's discretion to do so. While the FHFA's actions provided the Commission a compelling reason to cancel PON 401 (as acknowledged in Western Riverside's own Executive Committee meetings of August 2nd, and September 13th), no such justification was required. Indeed, this very litigation, which has stymied the award of the funds since March 2010, itself would provide an entirely adequate reason for the Commission to cancel the solicitation, and to proceed with another lawful manner of encumbering the funds, in light of the federal and state urgency pressing on the Commission to award the funds, and the Commission's assessment that Western Riverside's proposal did not offer the Commission what the Commission had requested in PON 401. Basic principles of contract law require mutual assent as to key terms; if there is no meeting of the minds, any contract is void. Thus no court can compel a party, especially an Executive Branch agency, to enter into a contract on terms the agency determines are unfavorable – or worse, as would be the case here, in violation of state energy policy.

2. The Trial Court Abused its Discretion in Granting the Temporary Restraining Order, Because Western Riverside Did Not Meet its Burden of Proof.

In considering a request for injunctive relief, including a TRO, the court must determine (1) whether the petitioner is likely to suffer greater

injury from a denial of the injunction than the defendants are likely to suffer from its grant, and (2) whether there is a reasonable probability that the petitioner will prevail on the merits. A TRO will not be sustained on review if it lacks substantial evidence for either of those factors. (See *Huong Que, Inc. v. Luu* (2007) 150 Cal.App.4th 400, 408 - 409.) Here, Western Riverside utterly failed to carry its burden on both of them.

Western Riverside presented no evidence at all on any harm that it might suffer if the TRO were not issued[1]. In fact, not only did Western Riverside fail to meet its burden of proof, but it also failed to inform the court below of a crucial matter – that Western Riverside itself cancelled its PACE programs because of the federal government's actions. As a result, even if PON 401 were somehow reinstated, Western Riverside could get no money under it. And even if PACE programs still existed, Western Riverside still could not get an award under PON 401, because Western Riverside's proposal failed to meet the fundamental rules of the solicitation, in that it did not involve using the most cost-effective energy efficiency measures first, but instead leapt to the use of potentially less cost-effective solar installations – in violation not only of the PON 401 rules, but also of

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[1] Not only did Western Riverside fail to meet its burden of proof, but it also failed to inform the court below of a crucial matter – that Western Riverside itself cancelled its PACE programs because of the federal government's actions. As a result, even if PON 401 were somehow reinstated, Western Riverside could get no money under it because PON 401made funds available only to entities that had PACE programs. Unfortunately, the Commission had essentially no opportunity to present any material to the trial court before the court issued the TRO; Western Riverside applied *ex parte* for the TRO (and the OSC) on October 12, 2010, serving the Commission at 4:05 p.m., and the court heard the matter at 8:30 a.m. on October 13, 2010. See Decl. of Michael J. Levy, Vol. VIII., Tab I, p. 2246.

state energy policy. Even a successful protest at DGS, could not change that fact.[2]

In contrast, as the Commission's accompanying Petition amply demonstrates, it is the Commission, and in fact the entire State of California, that will suffer substantial and irreparable injury if the $33 million in federal ARRA funds are lost.

Western Riverside also failed to demonstrate any likelihood that it would lawfully succeed in establishing contempt. As the next section of this Memorandum demonstrates, the cancellation of PON 401 and the re-awarding of the funds did not violate any express or implied terms of the trial court's May 21 Order. Thus there is no possibility that Western Riverside could prove beyond a reasonable doubt – the standard of proof in a contempt proceeding (*Ross v. Superior Court* (1977) 19 Cal.3d 899, 913) – that the Energy Commission is in contempt of that Order.

C. The Trial Court Abused Its Discretion in Issuing the OSC.

The OSC directs the Commission to show why it should not be held in contempt of court for allegedly having violated the May 21 injunction that forbade the implementation of a specific solicitation, PON 401, which was issued for energy projects to be carried out via the federal PACE program. A party can be held in contempt for violation of a court order

[2] Western Riverside's protest contended its application actually complied with the Loading Order as specified in the PON and solicitation guidelines. Since such a claim was contrary to the Commission's intentions in adopting the PON and guidelines, had General Services agreed with Western Riverside about what the PON's Loading Order requirement entailed, but did not set aside the PON as legally ambiguous, the Commission would certainly have cancelled the solicitation to ensure the funds were actually awarded in a manner consistent with the Commission's intent. The Commission could not proceed with awarding funds in violation of state energy policy.

(e.g., the May 21 injunction) only if (1) the order is valid; (2) the party had knowledge of the order; (3) the party was able to comply with the order; and (4) the party willfully disobeyed the order. (*In re Ivey* (2000) 85 Cal.App.4th 793, 798; *Board of Supervisors v. Superior Court (San Diego)* (1995) 33 Cal.App.4th 1724, 1736.) Here, the first, third, and fourth elements are absent for the same cause: the trial court's May 21st injunction, even if originally valid, became moot, so there was (and is) no valid order that could be violated[3]. Because three of the elements necessary to prove contempt are missing, the OSC on contempt is invalid.

The May 21 Order is moot because, first, it directs and forbids various actions with regard to PON 401 only. That solicitation was cancelled on July 28, 2010, and therefore there was nothing left for the Order to act upon. In order for an act to contemptuously violate an injunction, the acts constituting the contempt must be clearly and

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[3] The Commission appealed the May 21 Order but abandoned the appeal after the Order became moot. (Vol. VIII, D51, p. 1025.) We continue to believe, of course, that the May 21 Order was invalid. The trial court apparently believed that General Service's duty to hear that Western Riverside's protest was a ministerial act – otherwise, injunctive relief would have been improper. (See *State of California v. Superior Court* (1974) 12 Cal.3d 237, 247 (mandate can compel only a ministerial act).) The court failed to acknowledge, however, that General Service's ministerial duty to either hear or dismiss the protest would have arisen only following General Services' application of judgment to disputed facts about when the protest was actually received. (See *Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 501.) While the court seemed to believe that it could substitute its own judgment about the underlying facts, it should have instead given substantial deference to General Services finding, under the arbitraray and capricopus standard. (See *Bright Development v. City of Tracy* (1993) 20 Cal. App. 4th 783, 795.) In addition, the court erred by reversing the burden of proof, and requiring General Services to prove that Western Riverside's protest had not been timely filed (when it fact it was Western Riverside's burden to show that the protest was timely). (See 5/21/10 transcript, Vol. II, D30, p. 510.)

specifically prohibited by the terms of the injunction. (*Sorenson v. Superior Court (Santa Barbara)* (1969) 269 Cal.App.2d 73, 78.)

The May 21 Order is also moot because it enjoins the Commission from taking various actions until DGS hears Western Riverside's protest; however, on September 9, 2010, counsel for DGS informed WRCOG that:

> With the cancellation of PON [401], no contracts can be awarded thereunder. Pursuant to Public Contract Code section 10345, [DGS] no longer has the legal authority to hear a protest in the absence of an intended award. . . . In short, the subject matter of [Western Riverside's] protest has ceased to exist
>
> . . . .

(Vol. IV, Tab D52, p. 1046.) This too makes the May 21 Order moot, and therefore not a proper subject for contempt sanctions.

In addition, the OSC, and the trial court's oral comments on October 14, imply that the Commission's cancellation of PON 401 and re-award of the funds somehow violate the May 21 Order. Not so. The May 21 Order is limited to the *expenditure* of funds under *PON 401*. The *cancellation* of PON 401, and the *re-award* of the funds therefore have nothing to do with the Order. Moreover, as pages 9 – 10 above demonstrate, those actions are purely within the Commission's discretion and are, therefore, not sanctionable.

D. The TRO and OSC Can Result in No Justiciable Remedy

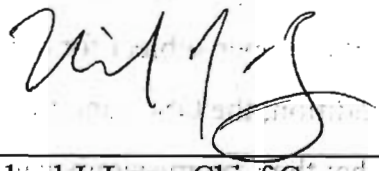
In view of all the aforesaid, it is unclear at best as to what remedy a contempt order could attach. No penalties, for contempt or otherwise, could extend the stimulus fund deadlines, restore the viability of PACE financing, or even compel the Commission to contract with any particular

entity on terms that the Commission has determined would violate state energy policy.

IV. Conclusion

For all of the reasons discussed above, this Court should (1) issue an immediate, temporary stay of the TRO and the OSC, and (2) issue a writ of prohibition and mandate that (a) forbids the trial court from hearing the OSC, (b) commands the trial court to vacate the May 21 injunction, the TRO, and the OSC, and (c) commands the trial court to dismiss the case.

Respectfully submitted,



Michael J. Levy, Chief Counsel

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1), Petitioner California Commission certifies that Petition for Writ of Supersedeas or Other Appropriate Stay Order or Relief for Stay of Writ of Mandate, Declaratory Order, and Injunctive Relief, has a word count of 13686, including footnotes.

Dated this 17th day of October, 2010.

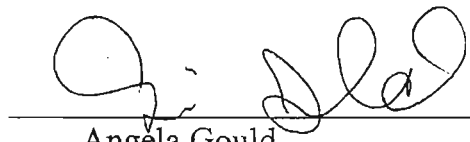
Michael J. Levy

VERIFICATION

Pursuant to California Rules of Court, Rule 8.112, subdivision (a) (5), I, Angela Gould, declare as follows:

I am an Energy Commission Specialist I with the Petitioner, California Energy Commission. I have four years of California Government work experience. I have served on evaluation commission and am familiar with the review, evaluation, and scoring of proposals. I have read the foregoing Petition for Writ of Mandate, Prohibition and/or Other Appropriate Writ or Relief and know its contents. The facts alleged in the Petition are true based on my knowledge and familiarity with the case.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed on October 18, 2010, at Sacramento, California.



Angela Gould

Case Name: California Energy Commission, Petitioner, v. Superior Court of the State of California, County of Riverside, Respondent, Western Riverside Council of Governments, Real Party in Interest

Case No.:

Court: California Court of Appeal, Fourth Appellate District, Division Two

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 9th Street, Sacramento, California 95814. On this date, I served the following documents:

__X__ **by E-mail** – by electronically mailing a true copy thereof to the office(s) of the addressees:

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT OR RELIEF TO VACATE TEMPORARY RESTRAINING ORDER, PROHIBIT HEARING ON ORDER TO SHOW CAUSE RE CONTEMPT, VACATE ORDER TO SHOW CAUSE AND INJUNCTION, AND DISMISS CASE

__X__ **by Overnight Mail** – by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, to the U.S. Post Office at Sacramento, California, addressed as set forth below:

RECORD OF SUPPORTING DOCUMENTS, REQUEST FOR JUDICIAL NOTICE, DECLARATION OF MICHAEL J. LEVY, Vol. I – VIII

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__X__ **by personal delivery**

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE WRIT OR RELIEF TO VACATE TEMPORARY RESTRAINING ORDER, PROHIBIT HEARING ON ORDER TO SHOW CAUSE RE CONTEMPT, VACATE ORDER TO SHOW CAUSE AND INJUNCTION, AND DISMISS CASE

Riverside Superior Court
4050 Main St
Riverside, CA 92501-3702

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 18, 2010, at Sacramento, California.

Kristen Driskell